90-1609

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARILYN GUERINOT, individually, and as representative of the Estate of Major THOMAS C. GUERINOT and as next of friend of TIMOTHY and JONATHAN GUERINOT, minors,

Petitioners,

vs.

ROCKWELL INTERNATIONAL CORPORATION and PRECISION SENSORS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the conflict between federal policy or interest and the operation of state law, required for the application of the government contractor's defense, a conflict between the general federal interest in military procurement and state law or, as petitioners contend, a conflict between the federal interest as expressed in the specific procurement contract and state law?

2. May the government contractor's defense be applied when the design choice at issue did not involve the exercise of a discretionary function by the Government?

3. Should the government contractor's defense be struck from the pleadings when it is undisputed that there is no conflict between the federal interest as expressed in the procurement contract and the operation of state law?

4. May the government contractor's defense be found to apply as a matter of law when the record reveals genuine issues of material fact regarding the availability of the defense?

5. On a motion for summary judgment, may a defense be deemed abandoned when the record reflects conflicting facts on that defense and the conflict has been brought to the court's attention?

LIST OF PARTIES

Petitioners are Marilyn Guerinot, individually, and as representative of the Estate of Major Thomas C. Guerinot and as next friend of Timothy and Jonathan Guerinot, minors, plaintiffs and appellants below, and respondents are Rockwell International Corporation and Precision Sensors, Inc., defendants and appellees below.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

MARILYN GUERINOT, individually, and as representative of the Estate of Major THOMAS C. GUERINOT and as next of friend of TIMOTHY and JONATHAN GUERINOT, minors,

Petitioners,

vs.

ROCKWELL INTERNATIONAL CORPORATION and PRECISION SENSORS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on January 18, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been reported, and is reprinted in the appendix hereto, pp. A1-A9, *infra*.

The memorandum decision of the United States District Court for the Southern District of California (Turrentine, D.J.) has not been reported. It is reprinted in the appendix hereto, pp. B1-B8, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1991. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The jurisdiction of the District Court was based on the diversity of citizenship between the parties. (28 U.S.C. §1332(a)(1).)

The death of the military pilot in this case, Major Thomas C. Guerinot, was caused by the failure of the escape system's speed sensor to function properly in a ground-level ejection. Instead of deploying the parachute in one-eighth of a second, as it had been designed to do in a ground-level ejection, the speed sensor deployed the parachute after two seconds, as if ejection was occurring at an altitude of over 10,000 feet. While a co-pilot ejected safely, Major Guerinot died when his seat hit the ground.

The primary issue in this case is whether there is a sufficient conflict between federal interest or policy, as expressed in the federal contract calling for the speed sensor, and the operation of state law, in order to justify the displacement of state law. (*Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) [displacement

will occur only where a significant conflict exists between an identifiable federal policy or interest and the operation of state law].) The district court, on defendants' motions for summary judgment, ruled that as a matter of law the government contractor's defense applied and the court of appeals affirmed. At the same time defendants moved for summary judgment, petitioners moved for a partial summary adjudication to strike the government contractors' defense from the answers, contending that since there was no conflict between the contract requirements and state law, the defense did not apply as a matter of law. The district court's order granting defendants' motions for summary judgment disposed of petitioners' motion.

In November 1963, the Department of the Navy issued a "Type Specification" for a proposal seeking a light counterinsurgency, armed aircraft, Model OV-10A. The Type Specification required "emergency escape throughout the entire flight envelope of the aircraft . . . including ground level escape at zero airspeed." In September 1964, shortly after the Navy had issued its testing requirements for Model OV-10A, Rockwell's predecessor, North American Aviation, Inc.,[1] issued document NA64H-895 which set forth the specifications for the escape system at issue in this case. NA64H provided, among other things, for a dual mode sensor system which would use altitude and airspeed to activate the ejection seat system in either a high or low mode.

The ejection system specified in NA64H-895 allows the pilot in the front seat to initiate ejection and parachute deployment for both the front and rear seats. The speed sensor determines when the ejection seat

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[1] All references will be to Rockwell rather than North American Aviation, as in the opinions and papers filed below.

deploys, based on altitude and airspeed. In low mode, originally intended to encompass ejections from an area of zero altitude, zero forward speed to a maximum altitude of 10,000 feet and 200 knots, there is a one-eighth of a second delay between the moment the seat leaves the aircraft and the beginning of parachute deployment. In high mode, designed for ejections beyond the maxima applicable to ejections in the low mode, the delay is extended to two seconds to allow enough time, before parachute deployment, for the seat to clear the aircraft.

The speed sensor had been designed by Rockwell before 1964. (Exhibit 6, para. 15, and Exhibit 16, Appellants' Excerpts of Record.) The Navy's action on the speed sensor is shown by a letter from the Naval Air Systems Command to Rockwell which 'released' the drawings and specifications of the speed sensor. (Exhibit 33, Appellants' Excerpts of Record.) The court of appeals found the Navy had approved the speed sensor, and the district court had found likewise. (Appendix, pp. A3, B2, *infra*.)

On November 15, 1965, after testing, the Navy issued document SD-556-1 (revision No. R-4) which specified that the ejection system be built in accordance with specification NA64H-895.

After further negotiations, the Navy, in 1966, ordered 223 model OV-10A aircraft from Rockwell. Rockwell, in turn, contracted with Precision Sensors, Inc. ("PSI") for the manufacture of a speed sensor, in accordance with the specifications which had been 'released' by the Navy in 1965.

The speed sensor uses an endcap which is attached onto a plunger. To ensure that the endcap is properly attached to the plunger, to prevent movement of the endcap, and to maintain the proper clearance between the endcap and the plunger, a locking agent must be

used. PSI advanced as an undisputed material fact before the district court that PSI has found the utilization of "loctite," an industrial strength thread locking compound, to be the best way to ensure a lack of movement between the endcap and the plunger. (Clerk's Record 51, para. 33, Appellants' Excerpts of Record.) The court of appeals found that loctite is widely used by the Navy and in industry. (Appendix, p. A8, *infra.*) However, a PSI official testified in his deposition that drilling and pinning would have been a suitable alternative to loctite. (Exhibit 32, Appellants' Excerpts of Record.)

The speed sensor specification which had been 'released' by the Navy in 1965 provided in relevant part that the speed sensor could utilize "standard instrument locking practices using epoxy cement to lock and seal threaded parts that are too small to safety wire." (Exhibit 29, Appellants' Excerpts of Record.)

The speed sensor in Major Guerinot's ejection seat failed to operate in the low mode because the plunger in the speed sensor had not extended quickly enough to activate the low mode. The government's investigations, a government engineer and defense and plaintiffs' experts whose depositions were taken in this action, all showed that the plunger had been fouled by loctite and therefore did not extend quickly enough to activate the low mode. (Exhibits 43, 44, 45, 56, and 57, Appellants' Excerpts of Record.)

In their opposition to the motions for summary judgment, petitioners summarized the state of the evidence on yet another cause for delay in plunger extension. This summary showed that there was some galvanic corrosion around an 0-ring retainer on the plunger but that one expert had testified that this was not enough to 'hang up' the plunger. (Clerk's Record 55, pp. 18-19, Appellants' Excerpts of Record.) Although petitioners

made clear that this was not an abandonment of their theory that galvanic corrosion may have contributed to the delay in plunger extension in supplemental papers filed before the district court entered judgment, both the district court and the court of appeals concluded that petitioners had abandoned this theory of recovery. (Appendix, pp. A9, B6, *infra*.)

In 1971, the Navy requested certain changes in the speed sensor which included changes in the airspeed tolerance of the speed sensor. Those changes were made, and this brought about a change in the designation of the speed sensor from the former "-1" designation to the "-9" sensor which was the type of sensor installed in the accident aircraft. Beginning in 1973, PSI made strong representations that the maintenance manual for the speed sensor be updated. This was not done until 1982 and the accident aircraft was last overhauled in 1980.

Whether the maintenance manual, provided by PSI, gave adequate warning regarding the use of loctite, remains a contested issue of fact even though both the district court and the court of appeals overlooked this. Mr. McKeown, a government engineer, who worked at the facility where the accident aircraft was overhauled, examined the speed sensor of the accident aircraft and thereafter had changes made in the maintenance manual which, in his opinion, prevented a recurrence of the fouling which had retarded plunger extension in Major Guerinot's ejection system. (Exhibit 67, Appellants' Excerpts of Record.) In the opinion of a PSI official, however, the maintenance manual, as PSI had drafted it, adequately dealt with the "possibility that excessive loctite had been applied and assure that any possible anomalous function resulting from that misapplication

will be disclosed." (Exhibit 56, Appellants' Excerpts of Record.)

The court of appeals concluded that the evidence showed that the extraneous loctite contamination was sufficient to cause the plunger to activate improperly and went on to find that the extraneous loctite would not have caused the accident if the curing and testing requirements had been followed when the sensor was overhauled. (Appendix, pp. A4-A5, *infra*.) This controverted Mr. McKeown's testimony in his deposition when he had stated that the capillary action which had drawn the loctite along the plunger "could occur within the guidelines of the manual, in the sense that no specific precautions were provided about that being a possibility." (Clerk's Record 55, pp. 16-17, Appellants' Excerpts of Record.)

REASONS FOR GRANTING THE WRIT

I.

THE CONFLICT REQUIRED FOR THE APPLICATION OF THE GOVERNMENT CONTRACTOR'S DEFENSE IS A CONFLICT BETWEEN THE FEDERAL INTEREST AS EXPRESSED IN THE PROCUREMENT CONTRACT AT ISSUE AND THE OPERATION OF STATE LAW

The court of appeals noted that the petitioners in this case have "... strenuously argue[d] that before the three-part test [of *Boyle v. United Technologies Corp.*, *supra*, 487 U.S. 500] is applied, this court must first find

a conflict between a federal interest embodied in the contract requirements and the duty imposed by state law." (Appendix, p. A7, *infra*.) The court of appeals then went on to hold:

> "The *Boyle* analysis, however, does not require, as appellant contends, that the Government have an interest in each and every feature of the aircraft. Rather, once a federal interest or policy has been identified, here, the procurement of military aircraft, the court must then determine, without regard to the contract requirements, whether a 'significant conflict' exists between that interest or policy and a finding of liability under state law." (Appendix, p. A7, *infra*.)

This Court in *Boyle* noted, as did the court of appeals in this case (Appendix, p. A7, *infra*), that the cost of federal procurement contracts directly affects the interests of the United States. (*Boyle v. United Technologies Corp., supra*, 487 U.S. 500, 507. The Court in *Boyle* then observed:

> "That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law. [Footnote omitted] Displacement will occur only where, as we have variously described, a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,'

> [citation] or the application of state law would 'frustrate specific objectives' of federal legislation [citation]." (*Boyle, supra,* 487 U.S. 500, 507.)

As noted, the court of appeals in this case identified the federal interest to be one of forestalling a rise in the costs of procurement contracts, if liability were imposed under state law. (Appendix, p. A7, *infra* ["The present case presents facts similar to those in *Boyle*. If liability is imposed, the result will likely be that the contractor will either increase prices in order to insure against future liability, or the contractor will decline future contracts."]) This is not only entirely unsupported and even specifically rejected by *Boyle*, as the preceding citation shows, it exempts from the application of state law each and every federal procurement contract. This is a sweeping assertion of federal power, wholly unsupported by the law as it has developed since *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), the landmark decision on the application of federal law where the federal interest arises in a diversity case. (*Boyle v. United Technologies Corp., supra,* 487 U.S. 500, 508, n. 4.)

This Court in *Boyle* made very clear that it is not the generalized federal interest in the costs of procurement but the federal interest, as specifically articulated in the contract, which is protected by the application of federal common law, *i.e.*, the government contractor's defense. In *Boyle*, this Court held that the defense applied because the plaintiffs in that case claimed state law required an escape hatch mechanism which opened *in*, while the federal procurement contract called for a hatch which opened *out*, and where the design obstructed, or so the plaintiff claimed, access to the escape hatch

mechanism. (*Boyle v. United Technologies Corp., supra,* 487 U.S. 500, 503, 509 ["Here the state-imposed duty of care that is the asserted basis of the contractor's liability (*specifically*, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications)." (emphasis added)].) The focus was on the federal decision to have a helicopter hatch which opened in; this Court did not apply the federal common law in *Boyle* simply and only because a federal contract was involved.

In distinguishing the facts, and result, of *Boyle* from cases where federal common law was *not* to be applied, this Court referred to *Miree v. DeKalb County,* 433 U.S. 25, 30 (1977) and a hypothetical "intermediate situation" as illustrative. (*Boyle, supra,* 487 U.S. at 509.) In *Miree,* the Court noted, "it was the contractual duty *itself* that the private plaintiff (as third party beneficiary) sought to enforce" (emphasis in original); hence, the suit in *Miree* "was not seeking to impose upon the person contracting with the Government a duty contrary to the duty imposed by the Government contract." (*Boyle, supra,* 487 U.S. at 508.) We have contended throughout that the duty the contract imposed in Major Guerinot's case was a recovery in the low mode; indeed, the Navy investigations of the accident forcefully endorsed this. (Clerk's Record 55, p. 21, Appellants' Excerpts of Record.) Petitioners in this case claim nothing more, and nothing less, than that the recovery should have been in the low mode. The duty under the contract, and the duty being claimed by plaintiffs, is one and the same. Under this Court's analysis in *Boyle* of this kind of situation, the conclusion is compelled that there is no

conflict, and that federal common law therefore cannot, and must not, be applied.

The same is true if petitioners' case is compared to the "intermediate situation" addressed in *Boyle,* where the duty sought to be imposed on the contractor is not identical to the one assumed under the contract but is also not contrary to the contract (487 U.S. at 509). It is true that, in a larger sense, the duty sought to be imposed is to have effected a recovery in the low mode, which is the duty imposed by the contract, and therefore the "intermediate situation" really does not apply. However, if petitioners' case is viewed more narrowly as claiming that loctite should not have been used or, if used, safeguards which the Navy adopted after the accident should have been implemented before the accident, then nothing in petitioners' case is contrary to the contract for the contract did not require loctite, but merely a suitable locking agent. That the choice of loctite was the contractor's, and not the Government's, we take up as a separate matter in Argument II.

In any event, we point to the Court's statement in *Boyle* that, in the "intermediate situation," "[n]o one suggests that state law would generally be pre-empted in this context." (*Boyle, supra,* 487 U.S. 500, 509.) In this case, not only has it been suggested that state law be displaced, the district court and the court of appeals have so held. We submit that only was this erroneous, it has completely rewritten the law on this subject in a way which *Boyle* specifically proscribed: the court of appeals has applied federal law in a diversity case only and solely because the contract was for the procurement of equipment by the United States. (*Boyle v. United Technologies Corp., supra,* 487 U.S. 500, 507 ["That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end

the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law [footnote omitted]."].) This is a very fundamental conceptual error with far-reaching consequences for, as has been observed, the government contractor's defense has the potential of displacing ". . . large chunks of the states' traditional prerogative over tort law, ..." (*Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 247, n. 9 (5th Cir. 1990).)

For the reasons stated, the court of appeals' decision in this case conflicts with the decision of this Court in *Boyle* and the extension of federal jurisdiction effected by the decision of the court of appeals in this case calls for the exercise of this Court's power of supervision, all within the sense of Rules 10(a) and 10(c) of the rules of this Court.

II.

THE GOVERNMENT CONTRACTOR'S DEFENSE CANNOT BE APPLIED IF, AS HERE, THE GOVERNMENT HAS NOT EXERCISED A DISCRETIONARY FUNCTION TOWARDS THE DESIGN FEATURE IN QUESTION

Once state law is to be displaced because there is a conflict between the federal interest as expressed in the contractual provision at issue and the operation of state law, the question is what the scope of the displacement is. In approving the three-part test for the scope of that displacement, this Court has noted that the first two prongs of that test — approval of reasonably precise specifications and conformance to those specifications

— ". . . assure that the suit is within the area where the policy of 'discretionary function' would be frustrated — i.e., they assure that the *design feature in question* was considered by a Government officer, and not merely the contractor itself." (Emphasis added.) (*Boyle v. United Technologies Corp., supra,* 487 U.S. 500, 512.)

The record in this case establishes that it was the contractor, PSI, who made the decision to use loctite in the speed sensor. We would like to stress that it was PSI which advanced as an uncontested fact that it had made the decision to use loctite in the speed sensor. (Clerk's Record 51, para. 33, Appellants' Excerpts of Record.) Proposed as an uncontested fact, it has remained, and is, uncontested.

While it is clear that the Government approved the speed sensor when it "released" the drawings (Exhibit 33, Appellants' Excerpts of Record), approval is not the same as the exercise of a discretionary function. Testimony by PSI's own employee shows that the only agency which exercised any discretion in the choice of loctite was PSI. That employee testified that there was a viable and effective alternative to loctite — drilling and pinning — but that PSI opted for loctite. (Exhibit 32, Appellants' Excerpts of Record.) Moreover, once the Government became aware of the dangers of loctite in the speed sensor, *i.e.*, after Major Guerinot was killed, it made changes in the PSI-produced maintenance manual which accounted for the dangerous properties of this substance. (Exhibit 67, Appellants' Excerpts of Record.)

Approval of the contested design feature must constitute a discretionary function on the part of the Government. (*Boyle v. United Technologies Corp., supra,* 487 U.S. 500, 511-512; *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989) *cert. den. sub. nom. General Dynamics Corp. v. Trevino,* __ U.S. __, 110

S.Ct. 327.) Approval "... under the *Boyle* defense requires more than a rubber stamp." (*Trevino v. General Dynamics Corp., supra,* 865 F.2d 1474, 1480.) The cryptic, three-line Navy memorandum (Exhibit 33, Appellants' Excerpts of Record) "releasing" the speed sensor drawings is approval thereof but, as we have seen, the record shows that the actual decision to use loctite in the sensor was PSI's alone — by its own admission. That discrete decision did not even receive the rubber stamp which the speed sensor drawings were accorded.

The court of appeals noted that the Navy, and industry, uses loctite and is familiar with it. (Appendix, p. A4, *infra.*) That has no bearing on whether it was wise to use it where it was used. The decision to do so was the contractor's, and not the Government's, and for this reason alone, the government contractor's defense should not be applied this case.

We submit the record establishes that no discretionary function was exercised by the Government and for this reason the first prong of the test — approval of specifications — has not been met. However, if the record does not incontestably establish this, at the very least the record shows a triable issue of fact. For this reason, which petitioners also urged vigorously in the courts below, respondents' motions for summary judgment should have been denied.

III.

THE MOTION TO STRIKE THE GOVERNMENT CONTRACTOR'S DEFENSE SHOULD BE GRANTED

Simultaneously with Rockwell's and PSI's motions for summary judgment, the petitioners made a comprehensive motion for a summary adjudication which sought to strike from the defendants' answers the government contractor's defense. (Exhibits 53 and 55, Appellants' Excerpts of Record.) Among others, the reasons set forth in Arguments I and II of this petition were advanced in support of that motion.

We respectfully submit that, as a matter of law, the necessary conditions for the application of the defense do not exist in this case. There is no conflict between the contractual provision in question and the respondents have failed to show that the decision to use loctite was a discretionary decision of the Government. In fact, on the latter point, PSI has demonstrated the very opposite. For these reasons, petitioners motion should have been granted.

IV.

THE RECORD REVEALS GENUINE ISSUES OF MATERIAL FACT REGARDING THE APPLICABILITY OF THE GOVERNMENT CONTRACTOR'S DEFENSE

We have contended in Argument II that, at a minimum, it is a genuine and material issue in this case whether the Government exercised any discretion in approving the use of loctite in the speed sensor. This issue goes to the first of the three tests determining the scope of displacement, *i.e.*, whether the Government approved the specification at issue.

It is also a genuine issue of fact, in the event the government contractor's defense is applied, whether warnings as to the use of loctite were adequate. Here the issue is framed by PSI's position that the maintenance manual, as PSI had prepared it, adequately dealt with the possibility that excessive loctite had been applied and that the manual assured that any anomalous function resulting from that misapplication would be disclosed, and Mr. McKeown's testimony that the same manual had to be (and was) changed after Major Guerinot's death because the manual's provisions for preventing fouling of the plunger shaft by loctite were inadequate. (Exhibit 56 and Clerk's Record 55, pp. 16-17, Appellants' Excerpts of Record.)

Petitioners have referred to Mr. McKeown's testimony, and argued its significance, before both the district court and the court of appeals but both courts have simply overlooked it. The court of appeals concluded that if the instructions of the manual would have been followed, the contamination would have been

prevented. (Appendix, pp. A4-A5, *infra.*) This very simply dismisses Mr. McKeown's testimony, which was to the contrary.

In a motion for summary judgment, the inferences must be drawn in favor of the nonmovant (*Matsushita Electric Industrial Co. v. Zenith Radio Co.*, 475 U.S. 574, 587 (1986)), and the evidence of the nonmovant must be believed. (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).) Time and again, including in the papers filed in support of petitioners' motion and in opposition to respondents' motions for summary, petitioners have pointed to the 'specific fact' of Mr. McKeown's testimony which showed there is a genuine issue whether the warnings and procedures of the maintenance manual were adequate, as was petitioners' duty to do. (*Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) [nonmoving party must designate specific facts showing there is a genuine issue for trial].) Yet, neither the district court nor the court of appeals took the slightest note of it, but instead resolved this contested issue of fact adversely to the petitioners. (Appendix, pp. A4-A5, B4, *infra.*) This was error, and has deprived the petitioners of their right to a trial by jury.

V.

DEFENSES SHOULD NOT BE DEEMED ABANDONED WHEN THE PARTY RAISING THOSE DEFENSES HAS NOT MANIFESTED ANY INTENT TO ABANDON THEM

In their motions for summary judgments, respondents took the position that petitioners had abandoned their

theories that the design of the speed sensor was defective because it failed safe into the high mode and the unit was defective because of metal corrosion caused by dissimilar metals.

After argument on the motions, and before the district court made its decision and entered judgment, petitioners made a written submission in which they pointed out that they had not abandoned any theory of recovery, referring to respondents' comments during argument on the motions that metal corrosion had been abandoned by petitioners. (Exhibit 58, Appellants' Excerpts of Record.) Petitioners pointed out that while there was some evidence which showed metal corrosion did not cause the delay in plunger extension, there was other evidence which showed it was a contributing cause. (Exhibit 58.) Petitioners also pointed out that *work* (and not discovery) on a complicated case proceeds to the eve of trial, and that, in any event, disputed questions of fact are not be resolved on summary judgement. Clearly, petitioners are entitled to favorable inferences on a summary judgment motion and they did point to testimony which showed that metal corrosion may have contributed to the delay in extension.

Both the district court and the court of appeals ignored all this and held that petitioners had abandoned that which they strenuously claimed they had not abandoned. (Appendix, pp. B6, A9, *infra.*) In fact petitioners devoted a separate argument in their Opening Brief, filed in the court of appeals, to the point that while they faced hurdles on their claim that failing safe into the high mode had been a discretionary decision by the Navy, the state of the record on the motions for summary judgment did not, without more, warrant the conclusion that it had been a discretionary decision. Petitioners' careful and repeated exposition that it had

not abandoned these defenses, and petitioners explanation of the scope of these defenses, were all lumped into one claim petitioners had not made, *i.e.*, that they wanted to engage in more discovery. The court of appeals', and the district court's, conclusion on this matter squares neither with the record nor with the position petitioners have consistently taken.

Petitioners fairly summarized the record, and pointed to evidence which indicated that their supplementary theories of recovery were very much alive. It was error to ascribe to them a position they did not take, *i.e.*, that more discovery was required and, notwithstanding their repeated written submissions to the contrary, conclude they had abandoned these theories.

CONCLUSION

For the reasons given, we respectfully submit this petition for certiorari should be granted.

DATED: April 15, 1991.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JAN 18 1991
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

MARILYN GUERINOT, individually and as representative of the Estate of Thomas C. Guerinot and as next friend of Timothy Guerinot and Jonathan Guerinot, minors,

Plaintiff — Appellant,

v.

ROCKWELL INTERNATIONAL CORPORATION; PRECISION SENSORS, INC.,

Defendants — Appellees.

Appeal from the United States District Court
for the Southern District of California
Howard B. Turrentine, Senior Judge, Presiding

No. 89-55881
D.C. No. CV-86-0394T
Argued and Submitted July 13, 1990
Pasadena, California

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Before: REINHARDT and HALL, Circuit Judges, and RE,** Chief Judge.

This is a diversity case arising from a malfunctioning military aircraft ejection seat which resulted in the death of Major Thomas C. Guerinot, the decedent of appellant Marilyn Guerinot. The appellant appeals from an order of the United States District Court for the Southern District of California granting appellees', Rockwell International Corp. (Rockwell) and Precision Sensors, Inc. (PSI), motion for summary judgment. The district court held that Rockwell and PSI were protected or immune from liability by the Government Contractor's defense. Concluding that they had been abandoned, the court also dismissed two of appellant's other theories of liability.

On appeal, appellant asks this court to consider whether the district court erred in: (1) its application of the Government Contractor's defense; (2) concluding that no genuine issues of material fact exist as to any of the elements of the Government Contractor's defense; and (3) concluding that the appellant had abandoned two theories of liability. On the facts before this court, which are not genuinely in dispute, we hold that the Government Contractor's defense was properly applied and that appellees cannot be held liable. Accordingly, we affirm the decision of the district court.

BACKGROUND

In November 1963, the Department of the Navy issued a "Type Specification" as to a proposal seeking a light counterinsurgency, armed aircraft, Model OV-10A.

** The Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

The Type Specification required "emergency escape throughout the entire flight envelope of the aircraft . . . including ground level escape at zero airspeed." In September 1964, shortly after the Navy issued its testing requirements for Model OV-10A, Rockwell issued document NA64H-895. This document contained specifications for a dual mode sensor system which would use altitude and airspeed to activate the ejection seat system in either a high or low mode.

Specification NA64H-895, and other evidence in the record, set forth the manner of operation of the ejection system. The system allows the pilot in the front seat to initiate ejection and parachute deployment for both the front and rear seats. The speed sensor determines when the ejection seats deploys, based on altitude and airspeed. In low mode, there is a one-eighth of a second delay between the moment the seat begins to move and the beginning of parachute deployment. In high mode, the delay is extended to two seconds to allow enough time, before parachute deployment, for the seat to clear the aircraft. After testing, the Navy issued document SD-556-1 which specified that the ejection seat system be built in accordance with specification NA64H-895.

After further negotiations, the Navy, in 1966, ordered 223 model OV-10A aircraft from Rockwell. Rockwell, in turn, contracted with PSI for the manufacture of a speed sensor, in accordance with Navy approved specifications, which would activate the ejection system.

In May 1971, the Navy requested that Rockwell refine the airspeed tolerance specification for the -1 sensor. Rockwell requested that PSI manufacture the EDS74DC-9 sensor (the "-9 sensor") to meet the new Navy specifications. Beginning in 1972, the -9 sensor was incorporated into the model OV-10A aircraft, including the aircraft Major Guerinot was ejecting from when he died. the -9 sensor changed the lower airspeed

limit for ejection in high mode, thereby increasing the airspeed limit for low mode ejection. The Navy requested the change after determining that safer ejection would occur with a higher airspeed limit for low-mode ejection.

The -9 sensor, like all of the sensors manufactured by PSI, uses an end cap which is threaded onto a plunger. To ensure that the end cap is properly attached to the plunger, and to prevent movement of the endcap, a locking agent must be used. PSI uses, in all its sensors, an industrial strength thread locking compound called loctite. Loctite, an adhesive which hardens in the absence of air, helps maintain the proper clearance between the endcap and the plunger, and prevents thread movement, is widely used by the Navy and the industry.

In 1980, despite PSI's objections, the Naval Air Rework Facility of Cherry Points, North Carolina (the NARF) used a -1 sensor manual to disassemble and overhaul the -9 sensor. During the overhaul, the NARF applied loctite to the plunger and endcap.

On November 16, 1984, the Model OV-10A aircraft, equipped with the overhauled -9 sensor, with decedent Major Guerinot as co-pilot, crashed during a simulated single engine landing at Camp Pendleton, California. The pilot, Captain Mueller, who controlled ejection, initiated ejection for both seats. It is undisputed that Major Guerinot's seat did not function in the low mode ejection sequence, and he died when his seat hit the ground.

After the accident, the Navy conducted an investigation. The Navy accident report states that an investigation of the -9 sensor "revealed that extraneous [loctite] contamination was most probably introduced during the last [overhaul]." Further, evidence reveals that the extraneous loctite contamination was sufficient to cause the plunger to activate improperly, and the extraneous

loctite would not have caused the accident if the curing and testing requirements had been followed when the sensor was overhauled.

DISCUSSION

Viewing the evidence in the light most favorable to the nonmoving party, we review *de novo* a district court's grant of summary judgment to determine whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. *See Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

We have consistently recognized the availability of the Government Contractor's defense when a finding of liability under state law would create a significant conflict with a federal policy or interest. *See McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448-51, (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). A recent Supreme Court decision accepted, for the most part, the defense as laid out in *McKay*. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, ___, 108 S. Ct. 2510, 2518 (1988). Hence, when as here, an action is brought to recover damages suffered in the course of military duties and attributable to allegedly defective military equipment designed in accordance with government-approved specifications, the Military Contractor's defense is available to displace state law in order to protect identified federal interests. *See Boyle*, 108 S. Ct. at 2518; *McKay*, 704 F.2d at 451.

In *Boyle*, the Supreme Court observed that disputes between private parties may have an adverse impact upon the federal government's interest in the procurement of military equipment. *See* 108 S. Ct. at 2515. The Court stated that "[t]he imposition of [state tort] liability on Government contractors will directly affect the terms

of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* The Court, however, added that a finding that an interest or policy of the United States i affected when it procures military equipment from an outside contractor, although a necessary first step, does not end the inquiry. For state law to be displaced, a "significant conflict" must exist between the federal policy or interest and a finding of liability under state law. *See id.*

The Court in *Boyle* reasoned that since the Government is immune from liability when it exercises its discretion in producing its own military equipment, the same protection should under some circumstances, be afforded outside military contractors when they are acting on government approved specifications. *See id.* at 2517-18. The circumstances which would require displacement of state law exist when there is a "significant conflict" between a finding of state liability and the federal policy or interest involved. *See id.* at 2518. If a defendant meets the three part test as set out in *Boyle*, a conflict exists and state law will be displaced. The conflict exists when: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* The *Boyle* analysis "assures[s] that the suit is within the area where the policy of the 'discretionary function' would be frustrated — *i.e.*, [it] assure[s] that the design feature in question" was a result of a government officer's consideration of the specifications, not merely the result of a decision made by the contractor. *Id.* Hence, we conclude, as did the district

court, that this formulation or analysis must be applied to the facts now before us.

Pursuant to the *Boyle* analysis, in the present case we must first determine whether there is a federal interest or policy that would be affected if liability is imposed upon the defendants under state law. The present case presents facts similar to those in *Boyle*. If liability is imposed, the result will likely be that the contractor will either increase prices in order to insure against future liability, or the contractor will decline future contracts. It seems clear that this directly affects the government's interest in procuring military equipment from outside contractors.

The appellant strenuously argues that before the three-part test is applied, this court must first find a conflict between a federal interest embodied in the contract requirements and the duty imposed by state law. The *Boyle* analysis, however, does not require, as appellant contends, that the Government have an interest in each and every feature of the aircraft. Rather, once a federal interest or policy has been identified, here, the procurement of military aircraft, the court must then determine, without regard to the contract requirements, whether a "significant conflict" exists between that interest or policy and a finding of liability under state law.

The next step is to address the *Boyle* three part test. First, did the United States approve reasonably precise specifications? The design must have been a result of continuous "back and forth discussions" between the Navy and the contractor, ensuring that the Government's approval was more than a "rubber stamp." *See Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir.), *cert. denied*, 110 S. Ct. 329 (1989). Additionally, the choice of a design which was produced by the contractor rather than the Government can still represent

a significant policy decision if the Government approved reasonably precise specifications. See *Boyle*, 108 S. Ct. at 2518.

During the development of the ejection system and its sensor, the Navy specified that the system be built in accordance with Rockwell's specification NA64H-895 by issuing documents SD-556-1 and SD-556-2. The system was originally equipped with the -1 sensor, and later with the -9 sensor. There is extensive documentation that the Navy and Rockwell interacted in more than a cursory way in their negotiations. The Navy required specific tests for the ejection system and changes were made as a result of certain failures during the tests. Specifications relating to the speed sensor were approved by the Navy. Additionally, although the Navy did not specifically require the use of loctite as a locking agent, the specifications state that an epoxy may be used as a locking agent, and evidence in the record indicates that the Navy has approved the use of loctite as an epoxy. Further, ample opportunity existed for the Navy to disapprove of its use. Loctite was used for many years in the model OV-10A aircraft and was applied to the aircraft in question by the NARF in 1980. Hence, it seems clear that the Navy approved reasonably precise specifications. *See Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019, 1025 (S.D. Ill. 1989).

The second *Boyle* element requires that the equipment conform to those specifications. The appellant does not claim that the speed sensor, with loctite as the locking agent, deviates from the specifications. Rather, the appellant claims the decision to use loctite was in error. Therefore, there is no issue of material fact as to the second *Boyle* element.

The third element requires contractors to warn of defects known to them but not known to the Government. There is no evidence that PSI or Rockwell knew

of any incident where a plunger of a sensor was hindered from functioning properly due to loctite contamination. Further, the overhaul manual, had its instructions been followed, would have guarded against the loctite contamination. However, its instructions were not followed. Since the contractor is only under a duty to warn of risks known to it but not to the Government, and is not held to a "should have known" standard, we conclude that appellees have met their duty to warn. *See Trevino*, 865 F.2d at 1487.

In sum, since the three prongs of the *Boyle* test are met, and there are no issues of material fact, state law will be displaced, and the Government Contractor's defense will protect the appellees from liability.

Since the evidentiary burden of showing a "genuine, triable issue of material fact" was not met despite the time available in the three years between the filing of the complaint and the motion for summary judgment, appellant's other theories of liability were properly dismissed as abandoned. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326-27 (1986). Accordingly, the district court's entry of summary judgment is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FILED
May 9 1989
Clerk U.S. District Court
Southern District of California
By Deputy

MARILYN GUERINOT, et al.,
Plaintiffs,
v.
ROCKWELL INTERNATIONAL CORPORATION, et al.,
Defendants.

Case No. 86-0394-T

ORDER RE SUMMARY JUDGMENT

The motion for summary judgment made by defendants ROCKWELL INTERNATIONAL CORPORATION ("Rockwell") and PRECISION SENSORS, INC. ("PSI") came on for hearing in Courtroom Nine, of the above-entitled court, on March 9, 1989, at 10:30 a.m., the Honorable Howard B. Turrentine, presiding. David Harney and Thomas Kallay, HARNEY, WOLFE, SHALLER & CARR, appeared on behalf of plaintiffs; James W. Hunt and George M. Stevens, Jr., appeared on behalf of defendant ROCKWELL; and Ralph S. LaMontagne, Jr., and Allan M. Bower, BRONSON, BRONSON & MCKINNON, appeared on behalf of defendant PSI.

The court, having considered the extensive briefs submitted by the parties in support of and in opposition to the motion for summary judgment, the evidence and

factual submissions filed in support thereof, the argument of counsel at the time of the hearing, the final briefs submitted at the court's request, the pleadings and papers on file herein, and good cause otherwise showing therefore, makes the following findings and order:

I. PRODUCTION OF THE -9 SENSOR

In mid-1971, the Navy requested ROCKWELL to prepare an Engineering Change Proposal ("ECP") to refine the airspeed tolerance specification for the EDS74DC-1-sensor (the "-1 sensor"), which was originally designed and manufactured by PSI, pursuant to Navy specifications. To accomplish the changes requested by the Navy, ECP No. 334 was prepared by ROCKWELL and submitted to the Navy. ECP No. 334 was specifically approved by the Navy.

As a result of and in response to the Navy ECP No. 334, and entirely new sensor, PSI part number EDS74DC-9 (the "-9 sensor") was designed and manufactured by PSI. The -9 sensor was desinged [*sic*] to meet the requirements set forth in Rockwell Control Drawing HE 289-5001 and Rockwell Procurement Specification No. HC-289-5001. Both the Control Drawing and the Procurement Specification contained the -9 sensor requirements which were approved by the Navy.

PSI began supplying -9 sensors on or about 1972, in accordance with the above-referenced specifications. Retrofit of the -9 sensor in the OV-10A aircraft, in place of the -01 sensor, was incorporated under Navy Air Crew System Change No. 252. The -9 sensor was eventually installed in the accident aircraft (serial number 334), which was shipped directly to the Navy in November, 1975.

The -9 sensor, like all of the sensors manufactured by PSI, utilized an end cap which is threaded onto the plunger. Since the internal position of the plunger vis-a-vis the latch mechanism is a critical dimension which must be carefully controlled and maintained, PSI designed the -1 and -9 sensors to utilize loctite. Loctite, an anerobic adhesive which hardens in the absence of air, helps to maintain the appropriate clearance after assembly and prevents the movement of the threads.

Loctite is an industrial strength thread locking compound which has wide application and use in both industry and by the Navy. The properties of the Loctite used on the end cap are spelled out in a specific military specification, MIL-S-46163, Type I, Grade K. PSI utilized and relied upon that specification in the design of the -9 sensor and the use of Loctite in it.

During the design phase, all specifications supplied by ROCKWELL, including the military specifications referred to, were analyzed and reviewed to ensure that the -9 sensor complied with same. When the design of the -9 sensor was defined for production purposes, it met all applicable specifications. Thereafter, before shipment from PSI, each -9 sensor underwent extensive and detailed testing to ensure compliance with the applicable specifications.

II. THE OVERHAUL MANUAL

PSI produced an overhaul manual for the -1 sensor. That manual was eventually published by the U.S. government. When the -9 sensor was produced, the Navy declined to purchase an overhaul manual for this component. Because of the differences in the internal construction of the two sensors, PSI advised the Navy not to prepare overhaul instructions based upon the revisions of the -1 sensor overhaul manual.

During late 1981, PSI became aware that the Navy was attempting to overhaul -9 sensors using the -1 manual. PSI wrote to the Naval Air Rework Facility at Cherry Point, North Carolina, on Jnauary [*sic*] 12, 1982, advising the Navy, in the strongest terms, not to attempt to overhaul the -9 sensors without proper documentation, and further, recommended that PSI be retained to conduct the overhauls. PSI also recommended that a training course be given at PSI's plant for the Navy's overhaul personnel.

III. MAINTENANCE AND OVERHAUL

The -9 sensor on the accident aircraft was completely disassembled and overhauled by the Naval Air Rework Facility ("NARF") at Cherry Point, North Carolina, in the fourth quarter of 1980. NARF did not, at that time, have an overhaul manual for the -9 sensor prepared by PSI. Instead, NARF followed the manual prepared for the -1 sensor in overhauling the -9 sensor. During the overhaul, Loctite was applied to the plunger end cap by NARF. While there was no -9 sensor overhaul manual available at NARF, if NARF had followed the -1 sensor manual the overhaul would have been successful and any problem with Loctite would have been discovered.

IV. THE ACCIDENT

On November 16, 1984, the Marine Corps OV-10A aircraft in which the decedent GUERINOT was riding crashed at Camp Pendleton. Major Thomas C. Guerinot was killed in that crash. The pilot attempted to eject both himself and Major Guerinot, but Major Guerinot's parachute did not deploy before he hit the ground. The aircraft was equipped with the -9 sensor, designed and manufactured by PSI.

V. POST ACCIDENT INVESTIGATION

Subsequent to the accident in which Major Guerinot was killed, the Navy conducted an investigation of the accident. The Navy determined that, while the sensors for both seats had properly activated in the ejection sequence, the low mode pyrotechnic cartridge in the rear (Major Guerinot's) seat did not discharge. Upon disassembly, Loctite was found to have contaminated the plunger and plunger bore in the -9 sensor for Major Guerinot's seat. The presence of the Loctite, alone, was sufficient to cause the hangup of the plunger. The Loctite was introduced into the sensor during the overhaul by NARF. From the time of the overhaul by NARF in the fourth quarter of 1980, to the time of the accident, the -9 sensor was not overhauled or tampered with, in any way. If the sensor had been "exercised," that is, activated, prior to the accident, the Loctite would have broken loose.

VI. ORDER

The court finds that the application of the so-called government contractor defense is appropriate in this action. The court further finds that all three tenets of the government contractor defense test are met, as set forth in *Boyle v. United Technologies*, ___ U. S. ___, 101 L. Ed. 2d 442, 458, 108 S. Ct. 2510, 2518, (1988). Specifically, based upon the factual findings set forth above, the court finds that:

(1) the United States approved reasonably precise specifications for the design and manufacture of the -9 sensor, as evidenced by the government approved Rockwell specification HC 289-5001, which provides for the use epoxy cement to lock and seal threaded parts, the Navy's adoption and use of the overhaul manual for the

-1 sensor which provides for the use of Loctite, and long-standing use of Loctite by the Navy for sensor overhauls;

(2) there is no dispute as to the second part of the *Boyle* test: plaintiffs do not argue that the equipment did not conform to the specifications;

(3) PSI had never heard of any incident in which any airspeed/altitude sensor experienced, or allegedly experienced, delayed plunger action due to Loctite contamination, in or around the plunger. Further, it is clear that the Navy knew of the possibility of contamination from Loctite, as evidenced by its own manual. There is no evidence that PSI was aware of any further risks engendered by the use of Loctite which were unknown to the Navy. As such, the court finds that PSI/ ROCKWELL met their duty to warn the Navy of dangers which they were aware.

The court finds that no issue of material fact remains with respect to these points.

Finally, the court finds that plaintiffs have abandoned two of their theories of liability, asserting (1) that the -9 sensor was defective in design as a result of its incorporation of a dual mode system which "failed safe" in the high mode, and (2) that the sensor unit was defective as a result of its utilization of dissimilar metals. Plaintiffs' arguments that they have not have [*sic*] adequate time to develop the facts supporting these theories is unavailing; this action is almost three years old — if plaintiffs have not been able to marshall any facts to support those theories in the preceding years, it is unlikely that they can develop such facts at all. Those theories of liability are dismissed. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Based on the foregoing

IT IS ORDERED that summary judgment be granted in favor of defendants ROCKWELL and PSI and as against plaintiffs with respect to the entire complaint.

DATE: 5/4/89

/s/ Howard B. Turrentine
HONORABLE H. B. TURRENTINE
SENIOR U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FILED
MAY 17 1989
Clerk U.S. District Court
Southern District of California
By Deputy

Marilyn Guerinot, et al
v.
Rockwell Int'l Corp, et al

JUDGMENT IN A CIVIL CASE
Case Number: 86-0394-T

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That summary judgment be granted in favor of defendants Rockwell and PSI and as against plaintiffs with respect to the entire complaint. . . . . .
. . . . . .

May 17, 1989
Date

WILLIAM W. LUDDY
Clerk

Tina R. Helart
By Deputy Clerk

SUPREME COURT, U.S.
FILED
MAY 16 1991
OFFICE OF THE CLERK

No. 90-1609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARILYN GUERINOT, individually, and as representative of the Estate of Major THOMAS C. GUERINOT and as next of friend of TIMOTHY and JONATHAN GUERINOT, minors,

Petitioners,

vs.

ROCKWELL INTERNATIONAL CORPORATION and PRECISION SENSORS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On January 11, 1985, plaintiff, Marilyn Guerinot, filed a complaint for wrongful death in the United States District Court for the Southern District of Texas. [E.R.,

Ex. 1.][1] This was followed by the filing of a First Amended Complaint and Second Amended Complaint. [E.R., Ex. 2.]

In the latter complaint, Ms. Guerinot, acting individually and in her representative capacity, sought damages from defendant Rockwell International Corporation ("Rockwell") and defendant Precision Sensors, Inc.[2] ("PSI") resulting from the death of her husband, Major Thomas C. Guerinot, which occurred at Camp Pendleton, California. His death occurred on November 16, 1984, following the crash of an OV-10A aircraft. [*Id.*] On February 14, 1986, the suit was ordered transferred to the United States District Court for the Southern District of California. [C.R. 1.]

On September 9, 1988, all three parties filed motions for summary judgment or adjudication. Rockwell and PSI filed motions for summary judgment with respect to the entire complaint. [C.R. 49-52, 58-67.] Plaintiffs filed a motion for partial summary adjudication, seeking an order that the military contractor's defense was unavailable as a matter of law to either defendant. [C.R. 53-57.]

The motions were heard by the Honorable Howard B. Turrentine on March 6, 1989. On May 9, 1989, the

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[1] The abbreviation "E.R." refers to the "Appellants' Excerpts of Record" filed with the court of appeals. The abbreviation "C.R." refers to the "Clerk's Record." Where citations to the record are made, specific page and line references will often be given. For example, "C.R. 1, 3:5-6" refers to lines 5 and 6 of page 3 of document number 1. As a second example, "C.R. 52, Ex. 7, 12:20-15:14" refers to the material beginning at line 20 of page 12 through line 14 of page 15 of Exhibit 7 to document number 52.

[2] Pursuant to Supreme Court Rule 29.1, this respondent discloses that United Electric Controls Company is the corporate parent of Precision Sensors, Inc.

district court entered its order denying plaintiffs' motion and granting defendants' motions. [C.R. 89, and Appendix B to Petition for Writ of Certiorari.] Judgment in accordance with the order was entered on May 17, 1989. [C.R. 90.]

Plaintiffs filed a notice of appeal with the Court of Appeals for the Ninth Circuit. The appeal was argued and submitted on July 13, 1990. On January 18, 1991, the court of appeals issued a memorandum decision affirming the district court's entry of summary judgment. [Appendix A to Petition for Writ of Certiorari.]

STATEMENT OF FACTS

Petitioners' statement of the case is incomplete and contains misstatements. This opposition will not set forth all facts but will point out the inaccuracies and complete the statement where inaccurate inferences might be drawn.

A. Approval of Specifications for the LW-3B Ejection System Including the -1 and -9 Sensors

The petitioners excerpt a single word from two of the Navy's approval documents — "released" — to create the inference that the Navy's review process amounted to something less than a knowledgeable approval of the parts and specifications in question. The facts do not support that inference.

In November of 1963, the United States Navy issued a Request for Proposal for the OV-10, a lightweight, armed counterinsurgency aircraft. [C.R. 63, Ex.7, 5:20-25.] The request set forth specifications and

requirements for the aircraft including the ejection seats. [C.R. 63, Ex.7A.] In September 1964, the Navy set forth engineering requirements for the OV-10 including the ejection seat system. [C.R. 63, Ex.7, 6:17-20.]

In response to the Navy's request and specifications, Rockwell issued its Specification (NA64H-895) for the aircraft. Included in this document were specifications for the workings of the LW-3B ejection seat system. [C.R. 63, Ex.7F.]

The specifications set out the details of a dual mode sensor system that used altitude and airspeed to activate the ejection seat system in either a high or low mode. [C.R. 64, Ex.7, 7:18-22.] Upon ejection, the sensor would determine if the airspeed of the aircraft was greater than 235 knots, or if the altitude was above 10,000 feet, and in either event was designed to deploy the parachute in the "high mode." In this mode, the parachute deployed two seconds after the seat left the aircraft. [C.R. 63, Ex. 7, 1:26-2:3.] The two second delay allowed for stabilization of the seat in flight. If the airspeed upon ejection was less than 235 knots, and the altitude was less than 10,000 feet, the parachute was to deploy one-eighth of a second after the seat left the aircraft. Under these circumstances, the system was said to be operating in the "low mode." [C.R. 63, Ex. 7, 2:3-7.]

The Specification described that threaded parts were to be locked: "All threaded parts shall be securely locked by safety wiring, self-locking nuts in conformance with specification with the MIL-N-25027(ASG), cotter pins, *or other approved methods*. . . . The unit may utilize standard instrument locking practices of using epoxy cement to lock and seal threaded parts that are too small to safety wire." (Emphasis added.) [C.R. 63, Ex.7G, 7.]

After testing, the Navy approved the Rockwell Specification in writing and specified that the ejection seat system was to be built in accordance with the Rockwell Specification. On October 15, 1964, the Navy and Rockwell entered into a contract for the production of seven prototype OV-10A aircraft, with the option to purchase additional aircraft. [C.R. 66, Ex. 7V2.][3] This contract incorporated by reference Navy Detail Specification SD-566-1 [C.R. 66, Ex. 7V2, 9] and also allocated funds for a mockup and test demonstration. [C.R. 66, Ex. 7V2, 1].

On January 12, 1965, the Navy approved for the first time the original Control Drawing for the speed sensor designated as HE289-5001. [C.R. 63, Ex. 7, 8:5-8.] This sensor control drawing specified the use of Procurement Specification HC289-5001. [C.R. 63, Ex. 7, 8:8-12.]

In January of 1965, 31 military officers from all four branches of the armed forces inspected a mockup of the OV-10A aircraft seats. [C.R. 63, Ex. 7, 8:13-15.] After the inspection, a mockup report was issued which contained an enclosure entitled "Daily Summary of Aircraft Mock-up Board Decisions." [C.R. 64, Ex. 7L.][4] Therein, the Navy approved or disapproved some 161 different items relating to the OV-10A aircraft.

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[3] Exhibit 7V contains both the contract for the prototypes as well as the supplemental agreement for the production model of the OV-10A. The supplemental agreement is attached to the top of the contract for the prototypes. For citation purposes, PSI refers to the prototype contract as "Ex. 7V2" and the supplemental agreement as "Ex. 7V1."

[4] The referenced document commences several pages into Exhibit L.

The Navy decided that a re-mockup was necessary and scheduled same for March 30 and 31, 1965. [C.R. 63, Ex. 7, 8:15-18.] Thereafter, a re-mockup report was issued by the Navy. That report approved the mockup of the OV-10A and its ejection seat, "[c]ontingent upon Re-mockup Board decisions." [C.R. 64, Ex. 7K.][5]

During the one-year period beginning on April 22, 1965, a series of test firings of the LW3B ejection seat system were conducted. [C.R. 63, Ex. 7, 9:13-14.] In total, 38 seats were test fired, 33 of which involved dynamic tests at various speeds conducted under military supervision at Holloman Air Force Base. [C.R. 63, Ex. 7, 9:14-19.]

On November 6, 1965, the Navy approved Sensor Control Drawing HE289-5001 and Sensor Procurement Specification HC289-5001. [C.R. 63, Ex. 7, 9:23-27.] On June 24, 1966, the Naval Aerospace Recovery Facility, based upon a review of the test results from the Holloman Air Force Base ejection seat tests, recommended that interim qualification be granted to the LW-3B system. [C.R. 63, Ex. 7, 10:14-17; C.R. 65, Ex. 7R.] Full approval was recommended to be withheld pending certain design changes unrelated to the speed sensor. [C.R. 63, Ex. 7, 10:17-19.]

On September 13, 1966, the Naval Air Systems Command ("NASC") granted full qualification to the LW-3B escape system. [C.R. 63, Ex. 7, 11:16-20; C.R. 65, Ex. 7S.] This qualification reflected the Navy's review and approval of the OV-10A/LW-3B mockup and the LW-3B test qualification. [C.R. 63, Ex. 7, 11:21-23.] On October 3, 1966, the NASC approved Revision C of

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[5] The quoted language can be found on page 2 of "Enclosure 1" to the document entitled "Supplementary Aircraft Mockup Board Report" which is located six pages into Exhibit 7K.

Rockwell Sensor Control Drawing HE289-5001 and Revision B of the Sensor Procurement Specification HC289-5001. [C.R. 63, Ex. 7, 11:24-27; C.R. 65, Ex. 7T.]

In 1966, the Navy ordered 223 model OV-10A aircraft from Rockwell. Rockwell contracted with Precision Sensors, Inc. ("PSI") for the manufacture of the speed sensor in accordance with the Navy approved specifications. The parts were procured under PSI part number EDS74DC-1 ("the -1 sensor").

In May 1971, the Navy requested that Rockwell refine the airspeed tolerance specification for the -1 speed sensor. Rockwell prepared Engineering Change Proposal ("ECP") No. 334 and submitted it to the Navy. The ECP was approved by the Navy on April 25, 1972. [C.R. 63, Ex. 7, 19:3-13; C.R. 67, Ex. 7MM.]

Rockwell requested that PSI manufacture the new sensor which bore PSI part No. EDS74DC-9 ("the -9 sensor"). [C.R. 52, 47:1-5.] Beginning in 1972, the -9 sensor was incorporated into the OV-10A aircraft. The -9 sensor used the same external housing and plunger as the -1 sensor. However, the internal mechanism was substantially revised. [C.R. 52, 47:6-19.]

Like the -1 sensor, the -9 sensor was used to actuate high or low mode operation of the ejection seat. The operating parameters were changed as follows: If the airspeed of the aircraft was at or below 200 knots *and* if the altitude was at or below 8,800 feet, the system was intended to operate in the low mode. If the airspeed was above 235 knots *or* the altitude was above 11,200 feet, the system was designed to operate in the high mode. Under all other conditions, the system could function in either high or low mode.

The ejection seat used by Major Guerinot when he died included the -9 sensor.

B. Approval of Loctite as Used in the Sensors

Both the -1 and -9 sensors use an end cap which is threaded onto a plunger. A locking agent is used between the end cap and the plunger to prevent movement of the cap, and to maintain the proper spacing between the end cap and the plunger. [C.R. 52, 49:10-22.] Loctite, an adhesive that hardens in the absence of air, was used by PSI as the locking agent. [C.R. 52, 52:20-21.] The speed sensor specification, approved by the Navy, required that a locking agent be used and that epoxy was a permissible locking agent. [C.R. 52, 48:17-23.] Further, the Navy had approved Loctite as an epoxy. [*See*, Military Specification MIL-S-46163, attached to the record as C.R. 52, 49:28-50:2, 55-68.]

C. Overhaul Manual for the -1 Sensor

When the -1 sensor was being produced, PSI supplied a draft of an overhaul manual for the component. The Navy made minor revisions to the draft and published it as an official Navy document. [C.R. 52, 51:17-20, 70-109, 112-134.] The overhaul manual was used by the Naval Air Rework Facility ("NARF") when overhauling the -1 sensor. After the -9 sensor was manufactured, the Navy declined to purchase an overhaul manual for that component. Because of the different internal construction of the -9 sensor versus the -1 sensor, PSI advised the Navy that it would not be feasible to prepare overhaul instructions for workers based upon revisions to the -1 manual. [C.R. 52, 51:20-25.]

Late in 1981, PSI became aware that the Navy was attempting to overhaul -9 units utilizing the -1 maintenance manual. [C.R. 52, 51:26-28.] PSI wrote to the NARF on January 12, 1982, and advised the Navy, in the strongest possible terms, not to attempt to overhaul the units without proper documentation and recommended that PSI perform all overhauls. PSI further recommended that it conduct a training course for the Navy's overhaul personnel. The Navy declined to follow PSI's recommendations. [C.R. 52, 51:28-52:7.]

D. Post-Accident Investigation

The post-accident investigation revealed that the -9 sensor from the accident ejection seat had been completely disassembled and overhauled at the NARF in the fourth quarter of 1980. [C.R. 52, 175:14-18.] During the overhaul, Loctite sealant was applied to the plunger end cap. [C.R. 52, 176:19-23, 193:3-8.] On disassembly after the accident, it was discovered that some of this Loctite had contaminated the plunger and plunger bore. [C.R. 52, 181:5-182:7.]

According to the Navy's investigation report, this contamination caused a delay in activation of the plunger. This caused the seat to eject in the high mode and consequently the parachute did not deploy before the seat hit the ground.

There was no indication that the sensor plunger was ever tested or activated from the time of overhaul to the date of the accident. [C.R. 52, 186:7-187:3.] If the plunger had been "exercised," the Loctite contaminant would have broken loose. [C.R. 52, 187:4-7.]

It is undisputed that even if the Navy in overhauling the -9 sensor involved in the accident had followed the

most rudimentary of instructions contained in the -1 overhaul manual, the Loctite contamination of the plunger could not have escaped detection. [C.R. 52, 52:8-11.] The only way that Loctite contamination of the plunger could have occurred and remained undetected is if the sensor had not been allowed to cure for the proper time as set forth in the manual. [C.R. 52, 53:20-24.] If the cure time requirements contained in the -1 manual had been properly followed, or if the overhauling personnel had followed the mandates concerning a 24-hour cure time before final testing, or if a plunger torque test had been performed, there could not have been a delay in plunger activation due to Loctite contamination. [C.R. 52, 54:3-9.]

It is also uncontroverted that, prior to the accident in question, PSI had never heard of any incident in which speed sensor had experienced, or was alleged to have experienced, delayed plunger activation due to Loctite contamination. [C.R. 52, 54:10-14.]

Petitioners appear to advance a new allegation in their statement of the case: "Whether the maintenance manual, provided by PSI, gave adequate warning regarding the use of Loctite, remains a contested issue of fact even though both the District Court and the Court of Appeals overlooked this." First, if this is indeed an issue pertinent to this appeal, it is raised here for the first time and thus is improper. *See, Miree v. DeKalb County, GA.*, 433 U.S. 25, 35, 53 L.Ed.2d 557, 97 S.Ct. 2490, 2496 (1977) (where an issue is neither argued nor briefed in the district court or in the court of appeals, the Supreme Court will not consider it). Second, the allegation contains a misstatement of fact; based upon the facts cited above, *the manual used at NARF to overhaul the accident sensor was NOT published by PSI and was in fact published by the Navy.*

REASONS FOR DENYING THE PETITION

I.

THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT THE WRIT OF CERTIORARI

Petitioners have not provided any basis to conclude that there are special and important reasons for this Court to grant the writ of certiorari. The issues raised in this appeal were all dealt with in this Court's recent decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 108 S.Ct. 2510, 101 L.Ed.2d 442, 56 U.S.L.W. 4792 (1988). The petitioners' questions presented can be reduced to one issue: Whether the court of appeals and the district court properly applied the Court's holding in *Boyle*. This does not constitute adequate grounds to grant the writ.

While the considerations listed in Supreme Court Rule 10 are not controlling, it is important that none of the considerations are applicable here. The decision rendered by the court of appeals is not in conflict with the decision of any other court of appeals, nor is there a conflict with a ruling by a state court of last resort. And, petitioners have to concede that even if one assumed for the sake of argument that the court of appeals was incorrect, the decision did not depart from the usual course of judicial proceedings. *See*, Supreme Court Rule 10(a).

Finally, it is worth noting that the decision rendered below was not certified for publication and thus cannot create a conflict between the courts.

II.

THE DECISIONS RENDERED BY THE COURTS BELOW WERE CORRECT

The main thrust of petitioners' argument is that the standards devised by this Court in its opinion in *Boyle v. United Technologies Corp.*, 487 U.S. 500, were misapplied by the court of appeals. It is the position of this respondent that the court correctly applied the *Boyle* standards; that petitioners misconstrue the standards; and that the court of appeals correctly ruled on the other issues raised by petitioners.

A. THE COURT BELOW CORRECTLY APPLIED THE *BOYLE* ANALYSIS

The government contractor's defense is a displacement of state law by federal common law. The *Boyle* case, in an opinion by Justice Scalia, sets forth the standards that must be met before this displacement can occur. The court held that the procurement of equipment by the United States is an area of uniquely federal interest and suits by private parties against government contractors implicate that interest. *Boyle*, 487 U.S. at 504-506. Once it is determined that an area of uniquely federal interest is implicated, state law will be displaced where a "significant conflict" exists between an identifiable federal policy or interest and the operation of state law. 487 U.S. at 507.

Relying on the discretionary function exemption to the Federal Tort Claims Act (28 U.S.C. § 2680(a)) this Court held that state law will be displaced where a judgment against a government contractor would threaten a discretionary function of the Government. *Id.* at

511-512. This Court enunciated a three-prong test to determine under what circumstances a "significant conflict" exists:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States. The first two of these conditions assure that the suit was within the area where the policy of the "discretionary function" would be frustrated — *i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability.

Id. at 512.

The court of appeals correctly applied each part of the *Boyle* analysis. The court first determined that there was a federal interest:

> The present case presents facts similar to those in *Boyle*. If liability is imposed, the result will likely be that

> the contractor will either increase prices in order to insure against future liability, or the contractor will decline future contracts. It seems clear that this directly affects the government's interest in procuring military equipment from outside vendors.

Memorandum opinion of court of appeals, see Petitioners' appendix p. A7.

After determining that there is a federal interest, the next step is for the court to determine whether there is a "significant conflict" between that interest and state law. *Id.* The three prong test, referred to above, is used to make that determination. The court of appeals found that each part of the test was satisfied:

> The next step is to address the *Boyle* three part test. First, did the United States approve reasonably precise specifications? The design must have been a result of continuous "back and forth discussions" between the Navy and the contractor, ensuring that the Government's approval was more than a "rubber stamp." *See, Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir.), *cert. denied*, 110 S.Ct. 329 (1989). Additionally the choice of a design which was produced by the contractor rather than the Government can still represent a significant policy decision if the Government approved reasonably precise specifications. *See, Boyle*, 108 S.Ct. at 2518.

> During the development of the ejection system and its sensor, the Navy specified that the system be built in accordance with Rockwell's specification NA64H-895 by issuing documents SD-556-1 and SD-556-2. The system was originally equipped with the -1 sensor, and later with the -9 sensor. There is extensive documentation that the Navy and Rockwell interacted in more than a cursory way in their negotiations. The Navy required specific tests for the ejection system and changes were made as a result of certain failures during the tests. Specifications relating to the speed sensor were approved by the Navy. Additionally, although the Navy did not specifically require the use of loctite as a locking agent, the specifications state that an epoxy may be used as a locking agent, and evidence in the record indicates that the Navy has approved the use of loctite as an epoxy. Further, ample opportunity existed for the Navy to disapprove of its use. Loctite was used for many years in the model OV-10A aircraft and was applied to the aircraft in question by the NARF in 1980. Hence, it seems clear that the Navy approved reasonably precise specifications. (Citation omitted.)

Memorandum opinion, see Petitioners' appendix, pp. A7-8.

The decision of the court of appeals is also supported by the post-*Boyle* cases decided by the lower courts. Those cases have repeatedly emphasized that the first prong of the test "requires only that the government approved *reasonably* precise specifications." (Emphasis in original.) *Smith v. Xerox Corp.*, 866 F.2d 135, 138 (5th Cir. 1989), *reh'g denied (en banc)* 876 F.2d 1154, *cert. denied*, 110 S.Ct. 327 (1989). *Accord, Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989). The courts have correctly ruled that the first criterion "is met by a showing of government approval *of the overall design*. It is *not* necessary that there be 'continuous back and forth discussions . . . regarding the inclusion or exclusion of the specific design deficiency alleged in [the] case.' " (Emphasis added.) *Maguire v. Hughes Aircraft Corp.*, 725 F.Supp. 821, 823-24, (D.N.J. 1989), *aff'd*, 912 F.2d 67 (3d Cir.), *rehearing denied* (No. 89-5970, Oct 5, 1990). *Accord, Harduvel, supra*, 878 F.2d at 1320.

In the present case, the government was not only "intimately involved" in the design of the aircraft as a whole, it was substantially involved in the design and production of the sub-component parts as well. PSI respectfully draws the Court's attention to the factual recitation at the beginning of this brief. It includes a litany of examples of government participation in setting the original specifications, approving the final specifications for the aircraft, mandating intermediate testing of both the aircraft and the ejection seat system, and specifically approving both the -1 and -9 sensors.

Further, there is substantial evidence of government approval of the use of Loctite. Rockwell specification HC289-5001 [C.R. 64, Ex.7J] which all parties concede was "approved" by the Navy, provides as follows:

> *Locking of parts.* — All threaded parts shall be securely locked by safety wiring, self-locking nuts in conformance with MIL-N25027(ASG), cotter pins, *or other approved methods. . . . The unit may utilize standard instrument locking practices of using epoxy cement to lock and seal threaded parts that are too small to safety wire.*

(Emphasis added.)

It is uncontroverted that Loctite is an industrial strength thread locking compound. [See, C.R. 52, 49:27-28.] It is also undisputed that the properties of Loctite are in total compliance with government authored MIL-S46163 which "covers single-component anaerobic compounds suitable for thread-locking and sealing." [C.R. 52, 49:28-50:6.] Loctite was "approved" by the government within the meaning of the *Boyle* test.

The court also found no issue of material fact as to the second prong of the *Boyle* test. There has been no claim that the speed sensor, with Loctite as the locking agent, deviates from the specification. See, Memorandum opinion, Petitioners' appendix, p. A8.

Finally, the court found no evidence that PSI or Rockwell knew of any safety risks regarding the use of Loctite. See, Memorandum opinion of court of appeals, Petitioners' appendix, p. A9. Thus, the third part of the test was fulfilled.

The court of appeals followed the *Boyle* analysis and correctly applied it.

B. PETITIONERS' ARGUMENT MISCONSTRUES THE *BOYLE* ANALYSIS

Petitioners argue that before applying the three part *Boyle* test, that there must be a preliminary finding of a "significant conflict" between a federal interest and state law. See, Petition for Writ of Certiorari, pp. 7-12.

As discussed above, the Supreme Court in *Boyle* set forth the test for application of the military contractor defense as follows: "Liability for design defects *in military equipment cannot be imposed*, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." (Emphasis added.) 487 U.S. at 512.

Although the emphasized language leaves absolutely no doubt that the military contractor defense is applicable whenever the above-cited three-part test is satisfied, petitioners argue that the high court did not mean what it said. Petitioners argue that in actuality the test is a *four* part test, with the first part requiring an affirmative demonstration of a "significant conflict" between federal interests and state law.

Petitioners argue that if there is a theory of recovery not inconsistent with the specifications approved by the military then that constitutes a state interest that is not inconsistent with the federal interest. In other words, any time that a plaintiff can devise a design alternative that would not have been ruled out by the design specifications approved by the military then there is no conflict with federal interests and the military contractor's defense cannot apply. This cannot be this Court's intention.

PSI does not deny that a "significant conflict" is necessary before the military contractor defense can be applied. The Court obviously had this in mind when articulating its test. The two theoretical alternatives supported by a fair reading of the case are that the significant conflict is inherent when dealing with the procurement of military equipment or that the three-part test itself is a test for the significant conflict. Based on either interpretation, the "significant conflict" standard has been met in this case.

C. PLAINTIFF'S OTHER ISSUES WERE RESOLVED CORRECTLY BY THE COURT OF APPEALS

1. The Overhaul Manual Was Not PSI's "Product" and Therefore, PSI Cannot Be Liable for Alleged Defects in the Manual

From the heading of petitioners' fourth argument and from Question Presented No. 4, it is difficult to concern the thrust of petitioners' argument. However, it appears that petitioners are arguing that PSI should have been held responsible for alleged defects in the -9 maintenance manual which supposedly led to an excessive amount of Loctite being placed on the sensor during overhaul.

There is one glaring error with respect to petitioners' argument. The particular manual in question was put together *by the Navy, not PSI.* While PSI did issue a draft manual for the -1 sensor, which the Navy adopted after making minor changes, *it never published a manual for the -9 sensor.* Indeed, it is uncontroverted that when PSI became aware that the Navy was attempting to

modify its -1 manual to overhaul -9 sensors, it warned the Navy not to use the manual in such a manner.

Further, assuming, *arguendo*, that PSI can be held responsible for the contents of the -1 manual, petitioners' theory must still fail as the manual was not defective. The only evidence on point is the uncontradicted declaration of John L. Button. Mr. Button stated that "[e]ven if the Navy in overhauling this particular -9 sensor had followed the most rudimentary of the instructions contained in the -1 overhaul manual, the Loctite contamination of the plunger could not have escaped detection." [C.R. 52, 52:8-11.]

Finally, the government contractor's defense applies to the manual. There is no question that the Navy approved the -1 manual as it expressly adopted the manual as its own. [See, C.R. 52, 112.] The approval was more than a mere "rubber stamp" as the manual actually published by the Navy reveals several small changes made throughout the document by the Navy. [Compare C.R. 52, 70-109 to C.R. 52, 112-134.] In its adoption, the Navy also proves that the manual conformed to its specifications.

It is equally obvious that the supplier warned the United States about the dangers and the use of the equipment known to the supplier. When PSI discovered that the Navy intended to use the -1 manual to overhaul -9 sensors, it advised the Navy to cease this practice. PSI also had no knowledge of any prior incident in which a sensor experienced, or was alleged to have experienced, delayed plunger activation due to Loctite contamination.

2. The Court of Appeals Was Correct That Two of Plaintiff's Theories of Liability Had Been Abandoned

The district court and the court of appeals also determined that there was no genuine triable issue of material fact regarding two theories of liability that were dismissed as abandoned. Despite this, in Section 5 of their brief and Question Presented No. 5, petitioners still assert that two theories are viable. Petitioners assert that even after the close of discovery, and the initiation of summary judgment motions, the court cannot rule that theories have been abandoned despite the total lack of evidence supporting those theories. If petitioners' argument were correct no court could ever grant a summary judgment or a summary adjudication of issues prior to trial.

CONCLUSION

For the reasons stated above, we respectfully request that this Court deny the Petition for Writ of Certiorari.

DATED: May 15, 1991.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARILYN GUERINOT, individually, and as representative of the Estate of Major THOMAS C. GUERINOT and as next of friend of TIMOTHY and JONATHAN GUERINOT, minors,

Petitioners,

vs.

ROCKWELL INTERNATIONAL CORPORATION and PRECISION SENSORS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the three-part test in *Boyle v. United Technologies Corporation* establish when a significant conflict exists between the federal interest and state law, sufficient to justify displacement of state law?

2. Were the lower courts correct in their application of the three-part test to two of petitioners' claims, and in finding that petitioners had abandoned two other claims because they did not present any evidence in opposition to respondents' proof?

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No. 90-1609

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

MARILYN GUERINOT, individually, and as representative of the Estate of Major THOMAS C. GUERINOT and as next of friend of TIMOTHY and JONATHAN GUERINOT, minors,

Petitioners,

vs.

ROCKWELL INTERNATIONAL CORPORATION and PRECISION SENSORS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Rockwell International Corporation ("Rockwell") respectfully submits this brief in opposition to the petition for writ of certiorari in this matter.

STATEMENT OF THE CASE

This case arose when a United States Marine Corps OV-10A aircraft crash landed because of pilot error during an air crew check ride. After landing short of the runway, the severely damaged aircraft slid out of

control, rolling up violently on its right wing just as the crew initiated ejection. The seat of the check pilot, Major Thomas C. Guerinot, was ejected about half as high and twice as far as the seat of the pilot, resulting in Major Guerinot's tragic death.[1] The altitude/airspeed sensor ("sensor") in Major Guerinot's seat was found, in a post-accident investigation, to have malfunctioned because Navy mechanics had fouled the sensor's plunger by misapplying loctite, an epoxy, during overhaul. It is undisputed that the plunger would not have been fouled had the Navy mechanics followed the Navy's overhaul manual, even though this manual was intended for the -1 sensor, not the modified -9 accident sensor. However, Navy mechanics disregarded the manual in two fatal respects. First, they disregarded step-by-step instructions for application and cure of loctite. Second, they failed to functionally check the sensor after overhaul which would have dislodged the misapplied loctite or resulted in the discovery of the binding plunger.

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[1] Rockwell's motion for summary judgment was based on the government contractor defense and on the alternate ground that, since there was no dispute that Major Guerinot's seat was ejected beyond design parameters, or "out of the flight envelope," the same tragedy would have occurred even had the sensor worked perfectly. The district court (affirmed by the Ninth Circuit) did not rule on this alternate basis for Rockwell's motion. Accordingly, for purposes of this petition challenging summary judgment below, respondent Rockwell has assumed that a perfectly functional sensor would have resulted in Major Guerinot's safe recovery.

A. The Primary Issue Presented to the Court Below.

The primary issue presented to the Ninth Circuit was whether the three-part test set forth in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) is the sole test for determining whether or not the terms of the federal military procurement contract at issue displaces any contrary state law finding of design defect, as respondents Rockwell and PSI contended. Petitioners contended that *Boyle* requires the court to apply a "threshold test" *before* applying the three-part test in order to determine whether there is a "substantial conflict" between the federal interest and state law sufficient to displace state law. The Ninth Circuit (as had the district court) rejected this claim and found that the three-part *Boyle* test, without more, defines the scope of the displacement of state law.

B. Evidence That the Navy Exercised Discretion in Approving Respondents' Design of the Sensor, Including the Choice of Loctite for the Sensor.

Respondent Rockwell's summary judgment motion was based on documentary evidence which proved that the ejection system of the OV-10A aircraft, including the sensor, had been produced by Rockwell and PSI pursuant to design parameters provided by the Navy and had passed all functional tests required by the Navy. The evidence further proved that Navy experts had exercised discretion in reviewing the design of the ejection system, including the design of the sensor, as set forth in detailed design drawings, by modifying and then

approving the final detailed specifications after a long qualification period. In addition, both the Navy and the Air Force took respondent PSI's draft of the overhaul manual for the -1 sensor and adopted it as their own by publishing it with certain changes as a mandatory directive for military personnel.

Notably, Loctite was expressly set forth in the Navy's procurement specifications as an allowable locking agent for the sensor; it was recommended for use in PSI's draft overhaul manual for the sensor; and it was ordered for use by both the Navy and Air Force overhaul manuals. The military was also very familiar with loctite, since it had long since published a detailed military specification discussing the characteristics of various anaerobic substances, including loctite (MIL-S-461563), and it had used loctite for many years.

C. Petitioners Mischaracterize the Facts in Attacking the Finding of the Court Below.

Petitioners mischaracterize the facts presented below. This is apparent when their four factual claims in the district court are compared with the respondents' proof.

Petitioners' first claim was that Rockwell should have produced a two-mode sensor which was fail-safe to the "low" mode, rather than to the "high" mode. Rockwell proved that the Navy had reviewed and approved precise specifications choosing the "high" mode as the fail-safe mode. The petitioners came forward with no contrary evidence. The district court, therefore, properly found that petitioners had abandoned this theory.

Petitioners' second claim was that the sensor failed to operate in the low mode, because it contained dissimilar

metals not properly protected against electrolytic corrosion. When respondent PSI's expert metallurgist demonstrated that the metals used in the accident sensor had been properly anodized and thus protected against corrosion, petitioners failed to produce any contrary evidence. The district court, therefore, found that this claim had also been abandoned.

Petitioners' third claim was that respondents' choice of loctite for the sensor had not been approved by the Navy. However, as just noted, respondents proved that the government knew the characteristics of loctite, and had specifically approved its use in the Navy's overhaul manual. The Navy had also independently procured loctite for, and misapplied it to, the accident sensor. The district court accepted these facts as establishing that the government had specifically approved (indeed required) the use of loctite during overhaul.

Petitioners' fourth claim was that the Navy's overhaul manual based upon PSI's draft had misled Navy mechanics into misapplying loctite by providing "inadequate" warnings to guard against misapplication. However, respondents proved that the Navy had not accepted PSI's offer to prepare an overhaul manual for the modified -9 sensor and that, in any event, Navy mechanics had violated the outdated overhaul manual they used, which had sufficient precautions to assure proper application of loctite.

Based upon these factual findings, the district court and the Ninth Circuit found that the three-part *Boyle* test has been met and the government contractor defense applies.

D. Corrected Recital of Certain Facts

Rockwell proved that "[f]rom the inception of the OV-10A/LW-3B programs through the present, design and modification of the systems was under the control of Government employees with expertise in operations, maintenance, safety and engineering." (Rockwell Exhibit 7, ¶9.)

For example, in November, 1963, the Navy issued a Type Specification as an enclosure to a Navy Request for Proposal. The Type Specification incorporated a military specification that "[t]he seat . . . shall function satisfactorily and adequately clear all airplane structure throughout the speed and altitude ranges of which the aircraft is capable . . . ." (Rockwell Exhibit 7, ¶11.) And in September, 1964, the Navy issued a document which set forth Navy testing requirements for the OV-10A aircraft, including requirements for the ejection seats. (Rockwell Exhibit 7, ¶12.)

There is no dispute that Major Guerinot's seat was ejected at an angle, yet no document prepared by the United States or by respondents required the accident aircraft's LW-3B ejection seat to have ground level ("zero/zero") ejection capability at an angle, but only in a level attitude. In fact, all dynamic testing, which was done with government participation and review was done with this seat ejected from a level attitude.

There were 38 dynamic sled test firings of the LW-3B ejection seat conducted under military supervision. After these tests, the military ordered certain design changes to the LW-3B ejection system. Test results were summarized in a final report which fully described the operation of the two mode LW-3B escape system, including the operation of the two mode sensor. (Rockwell Exhibit 7, ¶20.) After reviewing this report and

different revisions of the Sensor Control Drawing and the Sensor Procurement Specification (Rockwell Exhibit 7, ¶¶ 20 and 21), the Navy specified the use of this system in five of the seven prototype OV-10A aircraft. These aircraft were produced by Rockwell under a development contract with the Navy.

In August, 1966, Rockwell requested that full qualification status be granted to the LW-3B ejection system. (Rockwell Exhibit 7, ¶25.) In September, 1966, the Commander, Naval Air Systems Command, granted full qualification. Thereafter, the Navy set forth all of the above requirements, including specifications and drawings, in Detail Specification SD-556-2 for 223 production aircraft. The Navy approved the Sensor Procurement Specification, Revision "H" in June, 1968 specifying PSI as the manufacturer of the approved sensor. (Rockwell Exhibit 7, ¶34.) In January, 1970, the Navy inspected and accepted the accident aircraft, stating that it conformed to contractual requirements specified in Navy Detail Specification SD-556-2. Clearly, all this was not a cursory "release" of the specifications as petitioners' contend. (Petition p. 4, ¶4.)

In September, 1970, the Air Force, which also operated OV-10A aircraft equipped with the LW-3B ejection seat, issued an urgent action technical order to disable the high mode system of the ejection seat and only permit ejection in the low mode. (Rockwell Exhibit 7, ¶36.) In March, 1971, the Commander, Naval Air Forces in the Pacific, requested that the Navy approve the same modification. After consulting Rockwell, which advised against it since it would likely result in the death of any pilot bailing out above 10,000 feet or above 235 knots, the Commander, Naval Air Systems Command, rejected the Air Force modification. The NAVAIR Commander

discussed the advisability of incorporating a reverse operation plunger which would be fail safe to the low mode rather than to the high mode. The Navy rejected this change as well. The Commander, NAVAIR, then directed Rockwell to provide an Engineering Change Proposal ("ECP") to make certain other changes not relevant here. (Rockwell Exhibit 7, ¶¶ 36-45.) This redesigned sensor, which was supplied by PSI to the Navy, was the -9 sensor ordered by Navy Crew Systems Change No. 252. The accident aircraft was equipped with such a -9 sensor, which exactly conformed to the ECP approved by the Navy. (Rockwell Exhibit 7, ¶¶ 37-47.)

I.

THE TEST FOR DETERMINING WHEN THE GOVERNMENT CONTRACTOR DEFENSE APPLIES WAS ESTABLISHED BY THIS COURT IN *BOYLE v. UNITED TECHNOLOGIES CORPORATION;* THE NINTH CIRCUIT PROPERLY APPLIED *BOYLE* WHEN IT CONCLUDED THAT THE DEFENSE APPLIES IN THIS CASE.

The test for determining whether or not the government contractor defense applies in this case was established by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).[2] The Ninth Circuit carefully applied the *Boyle*

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[2] This test was a familiar one for the Ninth Circuit, since it established essentially the same "scope of displacement" of state law that the Ninth Circuit itself had previously adopted in *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), *cert den.*,

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test to the facts presented and reached the proper conclusion that the elements of the defense are met here. Petitioners misread *Boyle*, and misapply it, in order to challenge this holding in their petition for certiorari.

A. The Boyle Test

The *Boyle* analysis is a straightforward one that bears no resemblance to the confusing formulation of the petitioners.

This Court first determined — as a threshold matter — that disputes involving the procurement of equipment (specifically, the procurement of military equipment) by the United States are in an area of "uniquely federal" interest where preemption of state law by federal law is authorized provided the facts can demonstrate a "significant conflict" between federal policy and the application of state law. (*Boyle, supra*, 108 S.Ct. at 2513-2515.)

The Court then mandated application of a three-part test to determine whether, in fact, a particular military procurement dispute does involve a "significant conflict," sufficient to require the displacement of state law. It held that:

> "Liability for design defects in military equipment cannot be imposed pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifica-

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464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984). (*See Boyle, supra*, 108 S.Ct. at 2518 [approving *McKay*'s "scope of displacement"].)

tions; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *(Boyle, supra,* 108 S.Ct. at 2518.)

B. The Ninth Circuit Correctly Applied *Boyle's* Three-Part Test to the Facts Before it, and Properly Concluded That the Government Contractor Defense Applies in This Case.

Precisely tracking the procedure mandated by *Boyle*, the Ninth Circuit recited — as a threshold matter (*i.e.*, a "necessary first step") — that there is a federal interest in the procurement of military equipment and in forestalling the rise in procurement costs, which sets the stage for the government contractor defense. (See Petition Appendix pp. A5, ¶4 -A6, ¶1 and A7, ¶2.)[3]

The court then applied the three-part *Boyle* test to the facts before it to determine whether or not there is a "significant conflict" between this "unique federal" interest and liability under state law that requires the displacement of state law in this case. On the basis of overwhelming factual support for *Boyle* factors 1 and 3 (there was no issue of material fact with regard to factor

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[3] Contrary to petitioners' contention (Petition pp. 8-9) that the Ninth Circuit cited this "generalized federal interest" in equipment procurement as *the* basis for applying the defense, the court expressly stated that it was only a "necessary first step" in its analysis; scrutiny under the three-part test followed. (Petition Appendix p. A6 ¶1.)

2), the court of appeals held that there is, indeed, a "significant conflict":

(1) *First, the Navy had deliberately "approved" (not merely rubber-stamped) "reasonably precise specifications" for the speed sensor, and this discretionary approval included authorization of loctite as a locking agent in the sensor.* The court cited "extensive" documentary evidence that the Navy and Rockwell had "interacted in more than a cursory way in their negotiations" over the ejection system of the OV-10A and its sensor; proof that the Navy had approved specifications for the speed sensor, including specification of an "epoxy" as a locking agent for the sensor; and proof that the Navy had, in effect, approved the use of loctite in the sensor at issue since (a) the Navy had approved the use of loctite as an "epoxy," (b) the Navy had never disapproved its use, because it had used loctite for years in the model OV-10A aircraft, and (c) the Navy itself — *i.e.*, the Naval Air Rework Facility at Cherry Point, North Carolina ("NARF") — had applied loctite to the aircraft in question in 1980. (See Petition Appendix pp. A8, ¶2; B5, ¶3-B6, ¶1.)[4] In sum, the Ninth Circuit cited ample evidence to support *Boyle* factor 1, the discretion element of the government contractor defense, because it showed that the use of the speed sensor, *and* the use of loctite in the sensor, were carefully considered by the Navy, not merely by Rockwell itself. (*See Boyle, supra,*

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[4] As the district court noted, NARF applied loctite to the sensor at issue because of the "Navy's adoption and use of the overhaul manual for the -1 sensor, which provides for the use of Loctite"; indeed the overhaul manual required the use of loctite during overhaul; it also specified application and cure procedures, and functional testing after application, to guard against just the kind of mishap that occurred. (See appellee Rockwell's brief pp. 16:9-17, 18:1-16.)

108 S.Ct. at 2518; see also appellee Rockwell's brief pp. 38-46 [applying relevant case law to show that the Navy had exercised the requisite discretion in approving reasonably precise specifications, pursuant to *Boyle* factor 1].)

(2) *Second, the speed sensor conformed to the specifications approved by the Navy.* There was no issue of material fact as to this factor. (Petition Appendix p. A8, ¶3.)

(3) *Third, PSI and Rockwell met their duty to warn the government of any dangers known to them, but not known by the Navy*, since there was no evidence that respondents knew of any incident where the plunger of a sensor was hindered from functioning properly due to loctite contamination. Moreover, the Navy itself knew of the danger of loctite contamination without warning from respondents, since the Navy's overhaul manual contained instructions which would have guarded against it. (Petition Appendix pp. A8, ¶4-A9, ¶1; B6, ¶3.)[5]

In short, the Ninth Circuit faithfully applied the analysis mandated by *Boyle* and concluded (as had the district court) that "since the three prongs of the *Boyle* test are met, and there are no issues of material fact, state law will be displaced and the Government Contractor's defense will protect the appellees from liability." (Petition Appendix p. A9.)

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[5] The Navy clearly understood the properties of loctite, since Navy document MIL-S-461563 described the properties, including the adhesive properties, of various anaerobic substances, including loctite.

C. Petitioners Misconstrue *Boyle* in Order to Challenge the Ninth Circuit's Decision.

1. Petitioners Misapply the Three-part Test.

Petitioners' most obvious distortion of *Boyle* — "strenuously argue[d]" to the court below and apparently argued to this Court as well (see Petition p. 7, ¶3) — is that *before* the three-part test is applied, the court must find a "substantial conflict" between the federal interest embodied in the contract and the duty imposed by state law. However, such preliminary scrutiny would eliminate the very need for the three-part test which was devised by this Court as a practical guideline for determining when, in fact, a "substantial conflict" between federal policy and state law exists. (Petition Appendix p. A7.)[6]

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[6] Contrary to petitioners' contention that *Boyle* requires application of two tests — a "substantial conflict" test *and* the three-part test — *Boyle* requires only the latter. Indeed,

> "Between the seminal Ninth Circuit case of *McKay v. Rockwell Int'l Corp*, 704 F.2d 444 (9th Cir. 1983) in 1983, and the recent Fourth Circuit case of *Kleeman v. McDonnell Douglas Corp*, 890 F.2d 698 (4th Cir. 1989), six federal circuits in 16 different appellate cases have had occasion to consider the Government contractor defense in the area of the procurement of military equipment. Not one of these cases has engaged in the type of analysis that the appellants urge the court to adopt. Every one of these 17 circuit court opinions has applied the three-part *Boyle* test as the sole standard for whether the military

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In addition, petitioners misread the specific requirements of *Boyle* factors 1 and 3:

(a) Factor 1

Petitioners fail to successfully argue that the Navy did not 'approve reasonably precise specifications' for the use of loctite, over an allegedly suitable alternative locking agent — *i.e.*, drilling and pinning. (See Petition p. 5.) For although the procurement specification for the speed sensor did authorize a number of locking agents,[7] including "epoxy," and although respondents made the initial choice of an "epoxy" (*i.e.*, loctite) the Navy itself approved this choice, both knowingly and deliberately. As the Ninth Circuit properly found, approval was evidenced by the Navy's longterm use of loctite in the model OV-10A aircraft, the Navy's requirement of loctite in its overhaul manual, and NARF's application of loctite to the aircraft in question pursuant the Navy's manual. Under the case law, such "approval" is sufficient for *Boyle* factor 1. (*See e.g. Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir.

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> contractor should be shielded from liability by the Government contractor defense." (Appellee's brief pp. 27:18-25 and 28:1-8 and citations p. 28, footnote 10; see also *id.* pp. 23:15-18 and 25:1-6.)

[7] Procurement Specification HC 289-5001 (see M.E. #7J, ¶3.4.2), authorized the use of "standard instrument locking practices using epoxy cement to lock and seal threaded parts that are too small to safety wire." (See Petition p. 5.)

1986).)[8] Indeed, ultimate Navy approval of loctite makes respondents' initial choice of loctite irrelevant for purposes of *Boyle* factor 1. As the *Boyle* Court noted (108 S.Ct. at 2518):

> "The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design."

(b) Factor 3

Petitioners' argument that there is a factual dispute with regard to *Boyle* factor 3 is equally without merit. (See Petition pp. 6, ¶3 and 16, ¶2-3.) For they do not contend that proper warnings about the dangers of loctite were not made in the Navy's own overhaul manual (adopted from respondent-PSI's draft), but that these warnings were not "adequate."[9] However, *Boyle* factor 3 simply required respondents to warn the Navy about the dangers known to them, but not known to the Navy;

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[8] In *Dowd*, the Fourth Circuit found that there had been approval as required by the *Boyle* test, in the "length and breadth of the Army's [longstanding] experience with the 540 rotor system — and its decision to continue using it," since this demonstrated that "the Army approved the 540 rotor system ... in an atmosphere of awareness and in light of experience." (792 F.2d at 412.)

[9] Indeed, petitioners cite to Mr. McKeown's opinion testimony in his deposition (*i.e.*, "that the capillary action which had drawn the loctite along the plunger 'could occur within the guidelines of the manual, in the sense that no specific precautions were provided about that being a possibility' ") essentially to charge that the danger wasn't sufficiently highlighted to ensure that the average mechanic would follow the precautions mandated in the overhaul manual. (See Petition p. 7.)

the facts are incontrovertible that they did so. Factor 3 did not require respondents to emphasize or reiterate an identified danger; *i.e.*, it did not impose upon the warning requirement, as petitioners contend, a standard of 'adequacy.' Indeed, the *Boyle* Court specifically rejected the Eleventh Circuit's more stringent warning requirement in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (1985) *cert. den.* 108 S.Ct. 2896 (1988) when it stated:

> "it does not seem to us sound policy to penalize, and thus, deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects" (*Boyle, supra,* 108 S.Ct. at 2519.)

2. Petitioners Erroneously Conclude That There Is No "Substantial Conflict" in This Case

From petitioners' confused analysis of the *Boyle* test, *supra*, it is not surprising that they erroneously conclude that there is no "substantial conflict" between federal interest and state law to justify preemption in this case.

For example, they claim that there is "no conflict" because both the contract and state law allegedly require "zero-zero" ejection capability for the seats of the OV-10A aircraft. (See Appellant's opening brief p. 33:1-14.) However, this defines the design aspect at issue too broadly. For it is not the overall requirement of ejection capability that is relevant — but the narrower specification of loctite as the locking agent for the speed sensor *for* the ejection system that is at issue, since system failure was caused by loctite. Ironically, petitioners themselves expressly cautioned the Ninth Circuit

to apply the three-part test as the *Boyle* Court had, by "focus[ing] on the 'design aspect' that is at issue," which petitioners concede is the use of loctite. (Appellants' reply brief p. 5:15-27)

3. Petitioners Make a False Analogy Between the Instant Case and *Boyle's* "Intermediate Situation."

Precisely because there *is* a "substantial conflict" here, petitioners propose a false analogy between the instant case and the kind of "intermediate situation" for which, the *Boyle* Court hypothesized, preemption would be inappropriate. (108 S.Ct. at 2516.)

Boyle's "intermediate situation" involved no "substantial conflict" since under the hypothetical, the government simply specified one performance feature for the equipment it was procuring (*e.g.*, the cooling capacity of an air conditioner), but did not mention the design feature at issue (*e.g.*, the manner of construction), thus leaving the contractor free to "comply with both its contractual obligations and the state-prescribed duty of care." (*Ibid.*) By contrast, in the instant case compliance with respondents' federal and state obligations is impossible, since the Navy specified the use of "epoxy" as a locking agent and then approved loctite as the epoxy of choice, whereas petitioners contend that state law requires the use of a "suitable alternative" to epoxy, drilling and pinning. This represents a clear conflict between the federal interest and state law which disqualifies this case as an "intermediate situation" under *Boyle*.

In short, all roads lead to Rome. For under the Ninth Circuit's proper application of *Boyle*, and even under petitioners' skewed application, only one conclusion is possible: all the elements of the government contractor defense have been met.

II.

THE DISTRICT COURT AND THE NINTH CIRCUIT PROPERLY FOUND THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT PREVENTING APPLICATION OF THE GOVERNMENT CONTRACTOR DEFENSE AND THAT PETITIONERS HAD ABANDONED TWO OF THEIR CLAIMS.

A. There Were No Genuine Issues of Material Fact.

Petitioners claim that the Navy's own overhaul manual, which was based largely on a PSI draft manual, did not give adequate warning regarding the use of loctite since, according to McKeown, " '. . . no specific precautions were provided about [fouling with loctite] . . . being a possibility.' " (Petition p. 7.) They claim that respondents are liable for not adequately warning the Navy of this possibility. This position is erroneous. A contractor is only liable to warn ". . . the United States about dangers in the use of the equipment that were known to the supplier but not to the United States" (*Boyle* at 2518; see discussion at pp. 12, 15-16, *supra*.) Petitioners point to no evidence indicating that either PSI or Rockwell had such superior knowledge. (See Appellee PSI's brief pp. 44-46.)

B. Petitioners Abandoned Two Theories Which Had Been Raised in the District Court.

After three years of discovery, the district court established a date by which motions for summary judgment were to be filed. Petitioners did not make any motion for an enlargement of time based upon Federal Rule of Civil Procedure 56(f). In the face of the clear and uncontroverted evidence presented by respondents in their summary judgment motions — first, that the Navy had approved a two mode sensor which was fail safe to the high mode, and second, that the specifications provided for treatment of dissimilar metals in the sensor to prevent corrosion and, in fact, that the accident sensor had been appropriately treated as required — the petitioners presented absolutely no evidence. Indeed, their Statement of Material Fact No. 57 admitted that the metals were suitably treated and that, in any event, any corrosion on the metals did not play a role in delaying the action of the plunger. Faced with abundant evidence to support respondents' positions on these two issues, and no evidence from petitioners in opposition, despite three years of discovery, the district court and the Ninth Circuit both appropriately found that these issues had been abandoned by the petitioners.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the petition for writ of certiorari should be denied.

DATED: May 17, 1991.

Respectfully submitted,

MENDES & MOUNT

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